PoliticsNews

'Never seen anything like it': Sniper who left military over COVID-19 policy since found 'unconstitutional'

By Judy Trinh

Published: August 01, 2023 at 1:09PM EDT

A court battle is likely after a tribunal said the military vaccine mandate may have been unconstitutional. Judy Trinh reports.

The non-binding decision made by a Canadian military tribunal could result in a flood of new lawsuits against the federal government and reopen a divisive debate over vaccine mandates, a legal expert says.

The Military Grievances External Review Committee (MGERC) recently found that the implementation of the COVID-19 vaccine policy within the Canadian Armed Forces may have violated the Charter rights of some members.

MGERC is an independent administrative tribunal that reports to Parliament through the Ministry of National Defence.

The information you need to know, sent directly to you: Download the CTV News App

More than 400 military members were fired or quit after refusing to get the COVID-19 vaccine during the pandemic, and 157 of those cases were referred to the committee by the chief of defence staff (CDS) for review.

In at least three of the cases so far, the committee found that portions of the CAF vaccination policy and its COVID-19 directives may have contravened the Charter rights of soldiers who refused to be vaccinated.

MGERC found that the complainants' "right to liberty and security of the person by the CAF vaccination policy is not in accordance with the principles of fundamental justice."

In its response, adjudicator Nina Frid wrote that the policy was, in some aspects, "arbitrary, overly broad and disproportionate."

ALLEGED INTIMIDATION BY SUPERIORS

Dallas Alexander Flamand, a former sniper with the elite JTF2 special operations unit, is among those who left the military because of its vaccine policy.

Flamand says he hopes the MGERC findings will lead to a better approach by the Department of National Defence in implementing future health policies

Capital Dispatch: Sign up for the latest in federal politics and why it matters

Flamand said that he was reluctant to get vaccinated because he suffered from several concussions in his career, and was worried about the potential impact of the vaccine on his health. He says he faced “bullying and threats” by his superiors to get the shot.

“I was told by my chain of command, by our sergeant major, that he wanted me out of our troop by the end of the week, which was a very drastic response. I’d never seen anything like it in the 16 years that I served,” said Flamand in an interview with CTV News.

Flamand is now pursuing a music career, but says he would have stayed in the military if he had not been pushed out.

UNABLE VS. UNWILLING

Flamand is one of hundreds who are no longer members of Canada's military due to a directive dating back to the second year of the pandemic.

In October 2021, the CDS issued a directive for mandatory vaccination that aligned with the government of Canada’s policy for all public servants to get the shots. At the time, 91 per cent of the force had already voluntarily received two doses.

The directive, according to the MGERC, separated the unvaccinated into those who were “unable” for medical or religious beliefs, and those who were “unwilling.”

While those who were “unable” received accommodation measures such as remote work and regular COVID-19 testing, the report found that those who were “unwilling” to comply lost promotions or could not be deployed on international or domestic operations, and were subjected to discipline.

The mandatory vaccine requirement in the Canadian Forces was lifted a year later. By October 2022, 299 members were fired and 108 had left the force voluntarily as a result of the policy, according to the CAF.

Frid found the “livelihood, physical and psychological integrity” of the complainants were impacted, and as a result, she deemed the disputed provisions of the CAF vaccination policy “unconstitutional and therefore invalid.”

CALLS TO BRING BACK EXPELLED MEMBERS

Lawyer Phillip Millar calls the MGERC report “refreshing” and “unpolitical.”

The London, Ont.-based lawyer has represented several Canadian Forces members in legal battles against vaccine mandates. His most notable client is Warrant Officer James Topp, an army reservist who faces a court martial after criticizing the policy while wearing his uniform.

Millar says the Chief of Defence Staff Gen. Wayne Eyre should use MGERC’s decision as a reason to bring back the hundreds of skilled soldiers that lost or left their jobs because of vaccine mandates.

“This report gives (Eyre) the ammunition to say those releases were not fair to our soldiers. He could fix it today. Turn those decisions over and bring them back,” said Millar. “We have a recruiting shortfall that’s threatening operational security. But we kicked out hundreds of highly trained people.”

But it is unlikely that expelled members will be welcomed back into the fold.

Section 126 of the National Defence Act makes it an offence for members to reject vaccinations by refusing to obey an order.

After the vaccine mandate was lifted, Eyre said the refusal of some troops to get vaccinated “raises questions” about their suitability.

"It's dangerous in the military to have legal orders disobeyed," Eyre said last October. "It's a very slippery slope."

HUNDREDS OF SOLDIERS SUING

Flamand, who was part of the special operations team that held the record for longest kill shot, has joined a mass tort litigation against the federal government and Canadian Forces initiated by Alberta lawyer Catherine Christensen.

Even though the Canadian Forces doesn’t have to implement MGERC’s recommendations, Christensen says the committee’s findings represent a significant step forward in showing that the vaccine policy was "an unlawful order.”

Christensen represents 330 members, from tactical pilots to chaplains to cooks. Some of them say they didn’t want the vaccine because they had natural immunity from previous infections. Their claims include being denied parental leave and pensionable benefits, along with allegations of threats and loss of promotions.

The St. Albert-based lawyer says the lawsuits aren’t about vaccine mandates, but about the abuse of power and process. She expects more soldiers to join the legal battle after MGERC’s report.

“I don’t care if someone was vaccinated or not vaccinated. That has no bearing on this lawsuit," said Christensen. “This is about the taunting and bullying and harassment of these people. This isn’t anything to do

with COVID-19. This has to do with how the Canadian Armed Forces are treating their own people."

REFUTING THE CONSTITUTIONALITY CLAIM

But constitutional experts say the decision by the military grievance board is unlikely to hold up in court.

University of Ottawa law Prof. Erol Mendes, who teaches and researches constitutional and human rights law, says MGERC's findings are problematic, citing examples that have already been refuted in court.

Mendes says courts in several provinces have already upheld the constitutionality of vaccine mandates because the policies were based on the scientific information that was available at the time.

"You're not just talking about (individual) liberty and security of one person. What you do affects the liberty and security of person of others. And for that reason, the courts couldn't say they were infringed so much it was a violation of the Charter."

Mendes says the evidence shows that the military made attempts to accommodate those who are unable to get vaccinated, but under the Charter it's not required to accommodate the "unwilling."

Mendes says the Canadian Forces should move quickly to counter MGERC's claims in order to stop providing more oxygen to a divisive debate.

"I think most Canadians would say if you're unwilling to be vaccinated, that shows you're basically willing to take on the entire system in which you want to be employed."

The Canadian Forces has yet to decide if it will challenge MGERC's claims in federal court. In an email to CTV News, it said that vaccine-preventable illness is a hazard to individuals and the mission, and the force's vaccine policies take into account current medical evidence and the federal posture so the force can be ready operationally.

Related Stories

›Military eases vaccine mandate, presses ahead with discipline for unvaccinated troops›Defence minister stands by military's vaccine mandate amid months-long review›Fewer than 300 military members kicked out for failing to get COVID-19 vaccine›Military received 2,400 applications from permanent residents in November›Watchdog to probe how military police handled case against Maj.-Gen. Dany Fortin

Report an Error
Editorial standards & policies
Why you can trust CTV News

Judy Trinh
CTV National News, Ottawa Correspondent